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80-534

No.

Supreme Court, U. S.
FILED
OCT 3 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1980

JOY ADLER,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK.

PETITION FOR A WRIT OF CERTIORARI.

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Question Presented.

Where, over the course of three days, both the Los Angeles Police Department and the New York City Police Department perform successive warrantless searches and chemical analyses on the contents of a package originally opened by an airline employee in the mistaken belief that it contained hazardous material, was it not error for the New York Court of Appeals to rule that defendant's Fourth Amendment rights had not been violated?

Table of Contents.

	Page
Question Presented	i
Opinions Below	1
Jurisdictional Statement	1
Constitutional Provision Involved	1
The Relevant Facts	2
The Reasons for Granting the Writ	6
1. The decision of this Court in Walter v. United States, U. S. , 48 U.S.L.W. 4807 (1980), which was relied on by the dissenting Judge in the New York Court of Appeals, requires a reversal of the order denying defendant's motion to suppress	6
2. Since approximately 74½ hours elapsed between the time the New York Police Department allegedly became aware that the package was on its way to Kennedy Airport and the time defendant was arrested there was no reason why a search warrant could not have been obtained	9
3. The circumstances surrounding the acceptance and subsequent search of the package by the airline employee in Los Angeles strongly suggest that that search was itself illegal	13

Page

4. The "information" on which the arresting officer acted was no more than multi-level hearsay 18

5. The prosecution failed to establish an unbroken "chain of custody" with respect to the evidence sought to be suppressed during its numerous movements and changes of possession from the time it was allegedly discovered until the time defendant was arrested 19

CONCLUSION. For the foregoing reasons, this petition for awrit of certiorari should be granted. 20

Index to Appendix.

Opinion of Court of Appeals 1a

Order Granting Leave to Appeal to the Court of Appeals 18a

Order of Criminal Term, Part 21 ..... 20a

Opinion of Criminal Term 22a

Order of Appellate Division 32a

Opinion of Appellate Division 34a

Remittitur of the New York State Court of Appeals. 36a

Page

Table of Authorities.

CASES CITED:

Abelman v. Booth, 62 U. S. 506, 21 How. 506, 16 L. Ed. 169 (1859) 1
Arkansas v. Sanders, 442 U. S. 753 (1979) 8

Chess v. Colonial Penn Ins. Co., 93 Misc. 2d 765, 403 N. Y. S. 2d 765 19
Cohens v. Virginia, 19 U. S. 264, 6 Wheat. 264, 5 L. Ed. 257 (1821) 1
Coolidge v. New Hampshire, 403 U. S. 443 (1971) .. 8

Martin v. Hunter, 14 U. S. 304, 1 Wheat. 304, 4 L. Ed. 97 (1816) 1

People v. Bennett, 47 A. D. 2d 322, 366 N. Y. S. 2d 639 (1st Dept. 1975)..... 19
People v. Cadby, 62 A. D. 2d 52, 403 N. Y. S. 2d 940 (4th Dept. 1978) 10
People v. DeSantis, 46 N. Y. 2d 82, 385 N. E. 2d 577 (1978) 10
People v. Havelka, 45 N. Y. 2d 636, 641 18
People v. Jackson, 41 N. Y. 2d 146, 359 N. E. 2d 677 (1976) 10
People v. Kennedy, 32 N. Y. 141, 146..... 18
People v. Martin, 48 A. D. 2d 213, 368 N. Y. S. 2d 342 (4th Dept. 1975) 10
People v. Nicoletti, 34 N. Y. 2d 249, 313 N. E. 2d 336 (1974)..... 19

Page

People v. Spinelli, 35 N. Y. 2d 77, 358 N. Y. S. 2d 743 10
People v. Washington, 46 N. Y. 2d 116, 385 N. E. 2d 593 (1978) 19
Preston v. United States, 376 U. S. 364 (1964) 10

State v. Fondren, 285 Or. 361, 591 P. 2d 1374 (1979) 9

United States v. Block, 202 F. Supp. 705 (S.D.N.Y. 1962 10
United States v. Chadwick, 433 U. S. 1 (1977) 8
United States v. Clark, 475 F. 2d 240 (2d Cir. 1973) . 13
United States v. Davis, 482 F. 2d 893 (9th Cir. 1973) 13
United States v. Fannon, 556 F. 2d 961 (9th Cir. 1977) 13, 14
United States v. Ford, 525 F. 2d 1308 (10th Cir. 1975) 8
United States v. Jeffers, 342 U. S. 48 (1951) 10

Walter v. United States, U. S. , 48 U.S.L.W. 4807 (1980) 6, 8

OTHER AUTHORITIES:

U. S. Constitution, Article 3, Section 2, Clause 2 ... 1

U. S. Constitution, Fourth Amendment 1

Opinions Below.

The New York Court of Appeals opinion herein is reported officially at 50 N. Y. 2d 730. That opinion is not yet reported in the unofficial reports.

The Appellate Division, Second Department opinion is reported at 70 A. D. 2d 599, 416 N. Y. S. 2d 79.

The Criminal Term opinion herein is unreported.

Jurisdictional Statement.

The date of the order of remittitur of the Court of Appeals of the State of New York is July 3, 1980.

In this criminal proceeding from the highest court of the State of New York involving the application and interpretation of the Fourth Amendment to the Constitution of the United States, jurisdiction is conferred on this Court under United States Constitution Article 3 Section 2 Clause 2 (see, *Martin v. Hunter,* 14 U. S. 304, 1 Wheat. 304, 4 L. Ed. 97 [1816]; *Cohens v. Virginia,* 19 U. S. 264, 6 Wheat. 264, 5 L. Ed. 257 [1821]; *Abelman v. Booth,* 62 U. S. 506, 21 How. 506, 16 L. Ed. 169 [1859]).

Constitutional Provision Involved.

AMENDMENT IV—SEARCHES AND SEIZURES

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Relevant Facts.

(Preliminary to the recitation of the facts relevant to this petition, we respectfully request that the Court note, in particular, the *multiple levels* of unverified hearsay which formed the basis of the arresting officer's actions in New York.)

At approximately 2:30 p.m. on October 21, 1977, Officer Daniel R. McCarthy of the New York City Police Department ("NYPD") (the arresting officer) was on duty in his precinct when *he learned of* a telephone message that had allegedly been received from an agent Perori of the Drug Enforcement Administration ("DEA"). Agent Perori was claimed to have been told by an Investigator Lott of the Los Angeles Police Department ("LAPD") that a package was scheduled to arrive at Kennedy Airport in New York City at approximately 8:15 p.m. that day. The package was addressed to J. Adler. *There was no indication of how Investigator Lott had gotten this information.*

At this point, Officer McCarthy claims that *another officer* from the NYPD called Investigator Lott to obtain more information about the package. McCarthy claimed that that other officer, *whose identity McCarthy was unsure of,* was told that the package was wrapped in brown paper and addressed in green ink. McCarthy also claimed that Lott told the other NYPD officer that he [Lott] had gone to the airport in Los Angeles to see an employee of United Airlines by the name of Orr. However, on the record that allegedly was made of this telephone call, there is no mention of anyone named Orr or that he was an agent of United Airlines.

McCarthy did not know if Mr. Orr had been requested by the LAPD to look for suspicious packages and to inform the LAPD whenever he found such packages. McCarthy and his fellow officers were unaware if the initial lab tests made by the LAPD were done pursuant to a search warrant.

The story that was allegedly related to McCarthy by his fellow officer, who he was not able to positively identify, was that a white male had approached Orr to send a package on United Airlines to New York. It is claimed, without any substantiation, that Orr became suspicious of the sender because he appeared to be nervous. Orr supposedly X-rayed the package and thought "perhaps that it was a hazardous material" since the contents did not appear to be a vase, which is what the sender claimed was in the package.*

At this point, Orr allegedly opened the package and found pills therein. Although the contents were not hazardous, and it was never claimed that Orr had any idea that the pills were not innocuous, Orr contacted the LAPD. Investigator Lott allegedly went to the airport and removed the package to the LAPD lab where the analysis was claimed to have revealed the presence of amphetamines and barbiturates. Orr then resealed the package in which he had placed his initials and put it on United Airlines flight 8 to New York.

It is significant that at the hearing, Officer McCarthy did not produce the actual record or even a copy of the telephone call made in the telephone log. Moreover, the NYPD did not receive a copy of the LAPD report, which first identified Orr, until approximately a week or more after October 21, 1977.

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*Significantly, the sender had not been afraid to write his name and address on the package.

On the evening of October 21, 1977, Officer McCarthy went to the United Airlines Terminal at Kennedy Airport and took custody of the package after it was unloaded from the plane at 9:00 p.m. However, even though (1) he did not have a search warrant, (2) no exigent circumstances existed, (3) the contents of the package were already known, and (4) no one had called for the package yet, Officer McCarthy opened it at 11:30 p.m. in the presence of another police officer and an employee of United Airlines.

McCarthy left the airport with the pills that he took from the package and on his way home left them at the NYPD laboratory. He left word at the airport to tell anyone who came in to pick up the package that it had been "lost" and that "a trace would be put on it." McCarthy went off duty for the weekend (October 22 and 23).

During the course of the weekend, inquiries were made concerning the package and eventually, on Sunday, October 23, the defendant was told, pursuant to instructions given to the airline by the NYPD, that the package had been located and that it would be at Kennedy Airport sometime after 4:30 p.m. on Monday, October 24.

On October 24, Officer McCarthy took custody of the drugs at the police lab at 7:30 a.m. and went to the airport. When defendant arrived to claim the package at 5:00 p.m. she was arrested. (Note that the package that was turned over to defendant at the time she was arrested did not contain any contraband. The pills had been held by Officer McCarthy. Defendant's pocketbook was then searched and additional suspected contraband was seized therefrom.)

Defendant was subsequently indicted for possession of a controlled substance in the third degree (2 counts), possession of a controlled substance in the seventh degree (2 counts) and possession of marijuana. Defendant made an omnibus motion including a motion to suppress evidence illegally seized in violation of the Fourth Amendment. That motion resulted in a suppression hearing before Justice Richard A. Brown.

Justice Brown suppressed the evidence contained in the package but refused to suppress the contents of defendant's pocketbook. The text of Justice Brown's opinion is at pages 22a-31a of the appendix herein.

On appeal to the Appellate Division, Second Department, the order of Justice Brown (Appendix pp. 20a-21a) was modified and the motion to suppress was "denied in all respects" (Appellate Division order—Appendix p. 33a; Appellate Division opinion—Appendix pp. 34a-35a).

Defendant appealed from the Appellate Division order to the New York Court of Appeals.* The Court of Appeals affirmed the order of the Appellate Division in an opinion handed down on July 3, 1980 (Appendix pp. 1a-10a). However, Associate Judge Bernard Meyer dissented in an opinion (Appendix p. 10a) in which he advocated the reinstatement of Justice Brown's order suppressing the contents of the package.

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*The appeal was taken by permission of Judge Matthew J. Jasen of the Court of Appeals (Appendix pp. 18a-19a).

THE REASONS FOR GRANTING THE WRIT.

The record establishes that numerous standards designed to prevent violations of the Fourth Amendment were breached in this case thereby requiring the suppression of the evidence seized by the New York City Police Department at Kennedy Airport.

1. The decision of this Court in *Walter v. United States*, U. S. , 48 U.S.L.W. 4807 (1980), which was relied on by the dissenting Judge in the New York Court of Appeals, requires a reversal of the order denying defendant's motion to suppress.

Preliminarily, we note that the majority opinion in the New York Court of Appeals conceded that considered on its own, "the New York police action was violative of the Fourth Amendment proscription against warrantless searches." The concurring opinion then went on to acknowledge that if the opinions of Mr. Justice Stevens and Mr. Justice Stewart in the *Walter* case "were taken to be a statement of the present law, I would conclude that there should be a reversal in this case." The dissent likewise found the New York search objectionable but went on to question the validity of the Los Angeles search also. Finally, we respectfully request that in considering whether to grant this writ, this Court carefully review (1) the dissenting opinion of Judge Meyer of the New York Court of Appeals, and (2) the decision of Justice Brown at Criminal Term.

In this case, the actions of the LAPD were, at the very least, highly questionable. There is no evidence that United Airlines' employee Orr did not regularly work with the LAPD in examining and then turning over "suspicious" packages. All that was elicited at the suppression hearing was that Officer McCarthy of the NYPD

was not aware if Orr was regularly engaged in such quasi-governmental activities. Such evidence is patently insufficient to support any conclusion that Orr's actions were not "in furtherance of some objective of the government but on behalf of the airline."

Another serious deficiency in the prosecution's case is the numerous levels of hearsay which form the sole support for all of the actions taken by the NYPD. As the facts, Judge Meyer's opinion and Point 4 below indicate, this virtual "pyramid of hearsay" is legally insufficient to serve as the basis on which to deny defendant's motion to suppress.

A third obvious problem with the prosecution's evidence is revealed when the events in Los Angeles are examined. When Orr became "suspicious" of the contents of the package, he was concerned only with the possible presence of some device or material which might be an immediate hazard to the safety of the airplane and its passengers. Simply stated, Orr feared the presence of some sort of explosive device.

Upon opening the package there could have been no doubt that Orr's fears were unfounded. At this point there was no justification for Orr calling in the LAPD since there is no evidence that Orr knew that the contents of the package was contraband. As Judge Meyer aptly observed: "There is nothing to show that Orr had any basis for concluding that the pills he found were not wholly innocuous. The majority's finding that 'the private search revealed the presence of contraband' is a quantum leap from the evidence presented by the New York Police Officer McCarthy, the only witness presented."

In addition, even if one assumes that the LAPD was called in with justification, there is no evidence establishing any excuse for the failure to obtain a search warrant. Clearly, the package was already in the Airline's possession and could have been held up, as it evidently was, for chemical analysis, long enough to obtain a search warrant. There were no exigent circumstances of any sort present so as to relieve the LAPD of the requirement to obtain a search warrant. Significantly, the facts of this case repeatedly demonstrate the total lack of any rush at all in examining, analyzing, forwarding or claiming the package.

Finally, it is beyond question that the actions of both the LAPD and NYPD exceeded the scope of the private search initiated by United Airlines. Moreover, the LAPD had, at most, a right to possess but not examine the contents of the package, while the NYPD had neither the right to open nor examine the contents of the package.

All of these circumstances reveal that ample evidence was introduced to establish numerous Fourth Amendment violations took place from the time the package was first opened by United Airlines on October 21 until defendant was arrested on October 24. We submit that, at the very least, there is ample basis for this Court to grant the writ and review this case on the merits (*Walter v. United States,* U. S. , 48 U.S.L.W. 4807 [1980]; *Arkansas v. Sanders,* 442 U. S. 753 [1979]; *United States v. Chadwick,* 433 U. S. 1 [1977]; *United States v. Ford,* 525 F. 2d 1308 [10th Cir. 1975]; *Coolidge v. New Hampshire,* 403 U. S. 443 [1971]).

2. Since approximately 74½ hours elapsed between the time the New York Police Department allegedly became aware that the package was on its way to Kennedy Airport and the time defendant was arrested there was no reason why a search warrant could not have been obtained.

According to the evidence offered by the prosecution, the NYPD first became aware of the fact that a package allegedly containing contraband was being sent to New York from Los Angeles on October 21 at 2:30 p.m. Defendant was ultimately arrested at approximately 5:00 p.m. on October 24.* During that period of approximately 74½ hours the LAPD and NYPD demonstrated an outrageous disregard for the requirement that a search warrant be obtained when the circumstances permit.

A review of the facts shows that no exigent circumstances existed in Los Angeles or New York. In fact, the package was in the custody of United Airlines and then the LAPD for several hours in Los Angeles before it was even shipped to New York. During that time the LAPD removed the package from the airport, had the contents analyzed, returned the package to the airport and forwarded it to New York. There was no evidence to indicate that the person sending the package had the slightest preference for it to be sent on any particular flight.

Once the NYPD was telephoned at 2:30 p.m. on October 21, it had an additional six hours to obtain a search warrant while the plane was in flight. The failure to do so was inexcusable (see e. g., *State v. Fondren,* 285 Or. 361, 591 P. 2d 1374 [1979]).

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*Of course, as the record indicates, the LAPD had been aware of the existence of the package from the morning of October 21.

After the plane arrived, the package was held by the NYPD at the airport for an additional 2½ hours. At that time, without the slightest legal justification, officer McCarthy opened the package and removed the contents.

Incredibly, the contents were then taken to the NYPD laboratory and left there for approximately 55 hours (until 7:00 a.m. on October 24) while the police analyzed the pills. During this extended period of time the NYPD merely instructed United Airlines to stall defendant by claiming that the package had been lost.

Finally, on October 23, after defendant was told that the package had been located, the police themselves orchestrated the precise time that it could be picked up. The police set 4:30 p.m. on October 24, as the earliest time the package would be available. Thus, the officers involved had all of Monday, October 24 to obtain a search warrant. They still did not.

Such calculated disregard of the requirement that a search warrant be obtained, especially when no reason not to obtain one exists and there was at least three days in which to do so, should not be sanctioned by the judiciary (*Preston v. United States,* 376 U. S. 364 [1964]; *United States v. Jeffers,* 342 U. S. 48 [1951]; *United States v. Block,* 202 F. Supp. 705 [S.D.N.Y. 1962]; *People v. DeSantis,* 46 N. Y. 2d 82, 385 N. E. 2d 577 [1978]; *People v. Jackson,* 41 N. Y. 2d 146, 359 N. E. 2d 677 [1976]; *People v. Cadby,* 62 A. D. 2d 52, 403 N. Y. S. 2d 940 [4th Dept. 1978]; *People v. Martin,* 48 A. D. 2d 213, 368 N. Y. S. 2d 342 [4th Dept. 1975]).

As the New York Court of Appeals aptly observed in *People v. Spinelli,* 35 N. Y. 2d 77, 358 N. Y. S. 2d 743:

"The *Coolidge* court spelled out two very rational caveats on warrantless plain view searches and seizures.

"First, the court noted that plain view alone is never enough to justify a warrantless search and seizure (*Coolidge, supra,* p. 468, 91 S. Ct. 2022). And it makes no difference if the article seized is 'mere evidence', contraband or evidence of the crime or fruits of the crime. (*Coolidge,* p. 468, 91 S. Ct. 2022; see, also, *Warden v. Hayden,* 387 U. S. 294, 87 S. Ct. 1642, 18 L. Ed. 2d 782.) The second requirement is that the object must have come into plain view inadvertently (*Coolidge, supra,* 403 U. S. p. 466, 91 S. Ct. 2022). If the 'discovery is anticipated' (p. 470, 91 S. Ct. 2022) as in the case at bar, the warrantless search must fall. This requirement prevents law enforcement officials from circumventing constitutional requirements by waiting to effect a legitimate arrest when the defendant is near the incriminating evidence.

"In both the *Coolidge* case (*Coolidge, supra,* pp. 474, 464, n. 22, 91 S. Ct. 2022) and the case at bar, the law enforcement officials had the requisite probable cause to obtain a search warrant. The viewing of the trucks could not be said to be inadvertent. It should be noted, however, that upon the trial, the officers who viewed the trucks can testify as to what they saw from the golf course. The mere viewing of an object in the way in which it was done in the case at bar is not embraced by the concept of search or seizure.

"The fact that defendant was not arrested for possessing the stolen truck until the next day is not a relevant factor since, as defendant concedes, the officers had probable cause to arrest him for that offense before the trucks were seized. But the arrest of defendant in front of the house did not justify a

search behind the premises (see *Chimel v. California,* 395 U. S. 752, 89 S. Ct. 2034, 23 L. Ed. 2d 685, *supra*). And although there was a prior justification which enabled the officers to enter on the property (i. e., the credit card arrest), the truck did not then inadvertently come into plain view. In fact, the F.B.I. agent and State police officer who viewed the truck from the golf course were present when the arrest was made. They then proceeded immediately to the rear of the premises beyond the area of the arrest to where they knew the trucks were located. The arrest gave them no more justification to seize the trucks than if the officers had proceeded immediately to the rear of the house without effecting an arrest.

"The crux then is that there was ample time for the law enforcement officials to secure a warrant in order to make this significant intrusion onto defendant's premises. One must be careful to distinguish between constraints on police conduct which limit effective police enforcement and those constraints which merely make effective police enforcement more burdensome. In the case at bar there was absolutely no justification—either relating to exigent circumstances or the nature of the search or seizure effected—for not obtaining a search warrant. The mere fact that it would be burdensome to obtain a warrant, standing alone, is never justification for not obtaining a search warrant (*McDonald v. United States,* 335 U. S. 451, 455, 69 S. Ct. 191, 93 L. Ed. 153; *Coolidge, supra,* 403 U. S. pp. 479, 481, 91 S. Ct. 2022).

"We do a great disservice to the highly professional and efficient law enforcement officials of this State to determine that they cannot perform their job effectively without impinging upon a very

important constitutional right. Duties of law enforcement officials are extremely demanding in a free society. But that is as it should be. A policeman's job is easy only in a police state.

"The record in this case indicates excellent police work. The failure to secure a warrant was by no means a sinister attempt on the part of the police officers to deprive an individual of his constitutional rights. But in an age of advancing technology the court's vigilance in protecting a citizen's right to privacy becomes more necessary than ever before. The goal is not to protect criminals but to protect the standards of decency in our society. The privacy of an innocent citizen, of necessity, must be judged by the same standards as those applied to citizens who later are found to be guilty. As Justice Gulotta stated in his dissent: 'the validation of this search amounts to justifying a basically illegal procedure on the basis of the successful results in this particular case and thus encourages further incursions by the police on the rights of citizens in other cases where perhaps the results will not justify the means.'

"The order of the Appellate Division should be reversed and the order of the County Court suppressing the evidence should be reinstated."

3. The circumstances surrounding the acceptance and subsequent search of the package by the airline employee in Los Angeles strongly suggest that that search was itself illegal.

As the courts have repeatedly held (*United States v. Fannon,* 556 F. 2d 961 [9th Cir. 1977]; *United States v. Davis,* 482 F. 2d 893 [9th Cir. 1973]; *United States v. Clark,* 475 F. 2d 240 [2d Cir. 1973]), it is of critical importance whether someone wanting to utilize an airline's serv-

ices is given a choice of either submitting to the applicable regulations governing searches or refusing to be subjected to a search and simply not use the airline.

Here, there is no evidence that the person who sent the package was warned, in any manner, of the possibility that the package would be opened and searched. Thus, he was never given an opportunity to choose between sending the package or simply turning around and leaving the airport with the package. Obviously, under these circumstances the prosecution cannot claim that there was a voluntary waiver of the sender's Constitutionally guaranteed right to a reasonable expectation of privacy with respect to the package he was sending.

In this regard, the decision in *United States v. Fannon,* 556 F. 2d 961, is most persuasive:

> "These appeals present this question: Is a search by an airline employee of a package deposited with the air carrier for shipment subject to the limitations of the Fourth Amendment?
>
> "The material facts are not in dispute: acting in concert, the defendants, on successive days, deposited at the United Airlines freight office at San Diego, California, two packages for shipment by air to Milwaukee, Wisconsin. After the defendants had left the office, employees of the carrier, suspecting the packages contained drugs, opened them and discovered heroin secreted therein. They then turned the drugs over to federal law enforcement officers. Defendants were eventually indicted, tried jointly and convicted of multiple counts of violating 21 U.S.C. §§ 841(a) (1) and 846.
>
> "The principal error they assign is the court's ruling refusing to suppress the use of the drugs as

evidence. The court based its ruling on the ground that because the searches originated with and were conducted by airline employees acting alone, they were private in character and hence not governed by the Fourth Amendment.

"We conclude that this ruling was error.

* * *

"The question thus becomes: does this statute—which by its terms authorizes carriers in air commerce to condition transportation on the consent of the passenger or shipper to a search —confer on the carrier a governmental function sufficient to subject its conduct to constitutional limitations? (cits. omitted).

"We conclude the answer is 'yes.'

"Measured by its evident purpose, the statute is more than merely declaratory of a pre-existing common law power of search on the part of common carriers (cits. omitted).

"Its circumscribed object—the detection and seizure of 'dangerous weapon[s], explosive[s], or other destructive substance[s]'—is predicated upon a real and demonstrable threat to the public safety which the public authorities, notably the police, have traditionally been relied upon to combat. The statute does not speak to the distinguishably private interest of the carrier of goods in insuring against pilferage, or criminal or civil liability, or in determining the identity of the shipper, or that the applicable tariff is charged, or any other discernably private non-governmental interest.

"Moreover, the fact that section 1511(b) was passed as part of a congressional effort 'to statutorily provide security against acts of criminal

violence directed against air transportation' (H. R. Rep. No. 93-885, 93d Cong., 2d Sess. 9 (1974) U. S. Code Cong. & Admin. News 1974, p. 3976), strengthens the view that Congress must have considered the danger presented by air shipments of weapons, explosives, etc., to be sufficiently substantial to bring the subject within the ambit of the government's air transportation security scheme. Certainly it is not unreasonable to conclude that Congress thought it worthwhile to include the subject of air freight shipments within the reach of an administrative scheme designed to enhance the security of air transportation from acts of criminal violence. Confronted as we are with explicit statutory language authorizing air carriers to exact the shipper's consent to a weapons search as a condition to transport and a less than eloquent legislative history, we can imagine no reasonable alternative construction of the statute.

"Accordingly, we believe that Congress intended to employ the efforts of private air carriers in insuring the security of air transportation from seizure, bombings and like forms of criminal violence. In so delegating the conditional and circumscribed power of search embodied in section 1511(b), Congress has conferred on air carriers a governmental function subject to constitutional limitations (cits. omitted).

"We are thus led to the conclusion that in appropriating the efforts of private air carriers in aid of the government's administrative scheme to strengthen the security of air transportation, Congress supplanted whatever common law power of search air carriers may have had and subjected such searches to the Fourth Amendment's standard of reasonableness (cits. omitted).

"Having determined the Congress intended to include inspections of air freight by private carriers as an element in the administrative apparatus designed to reduce threats to aircraft security, the remaining question is the extent to which such searches are limited by Fourth Amendment standards. In this case, however, we need not determine whether administrative searches of the specific type in issue here pass constitutional muster in all respects. Cf. *United States v. Davis, supra,* at 910-913.

"We are clear that as a threshold matter, searches of articles presented for air freight shipment (like the hand baggage, etc., of boarding passengers) must be preceded by reasonable notice to the shipper that search is a condition of carriage. This notice may take various forms and will be deemed reasonable if sufficient to apprise the ordinary shipper of the condition. In effect, our holding in this case does no more than make explicit, under constitutional compulsion, the conditional consent to search which Congress impliedly inserted in all agreements for the carriage of goods in air transportation by enacting section 1511(b)."

We submit that in applying this standard to the instant case, the proof elicited with regard to the transactions in Los Angeles is fatally defective and cannot serve as the sole basis to support defendant's arrest three days later and three thousand miles away.*

*It must be remembered that even the majority found the New York search to be illegal. Thus, the prosecution's entire case rests on the actions taken by United Airlines in Los Angeles and the LAPD.

4. The "information" on which the arresting officer acted was no more than multi-level hearsay.

As the facts of this case and the dissenting opinion of Judge Meyer clearly indicate, the "proof" elicited by the prosecution, which had the burden of establishing that the evidence sought to be suppressed was seized legally, was no more than "fourthhand hearsay." The danger envisioned by the New York Court of Appeals in *People v. Havelka,* 45 N. Y. 2d 636, 641, in relying on a "tenuously balanced . . . pyramid of hearsay" is precisely what occurred here.

The totally unsubstantiated and unverified observations by and communications between United Airlines employee Orr, Investigator Lott of the LAPD, Agent Perori of the DEA, Officer McCarthy of the NYPD and other law enforcement officials whose identities were never positively established, demonstrates the "unreliability of the evidence they [the prosecution] have produced" and the wisdom expressed by the New York Court of Appeals in *People v. Kennedy,* 32 N. Y. 141, 146, when it stated:

> "[Circumstantial evidence] consists in reasoning from facts which are known or proved, to establish such as are conjectured to exist; but the process is fatally vicious, if the circumstance from which we seek to deduce the conclusion depends itself upon conjecture."

5. The prosecution failed to establish an unbroken "chain of custody" with respect to the evidence sought to be suppressed during its numerous movements and changes of possession from the time it was allegedly discovered until the time defendant was arrested.

The evidence sought to be suppressed in this case changed hands at least nine times between the time the

package was first brought to United Airlines in Los Angeles on the morning of October 21 and the time defendant was arrested on the evening of October 24. The changes of possession are as follows: (1) United Airlines to LAPD, (2) LAPD to laboratory, (3) laboratory to LAPD, (4) LAPD to United Airlines in Los Angeles, (5) United Airlines in Los Angeles to the plane for a six-hour flight, (6) the plane to United Airlines in New York, (7) United Airlines to NYPD, (8) NYPD to laboratory, and (9) laboratory to NYPD.*

Although the evidence in this case was transferred so many times in the three days between October 21 and October 24, very little proof was offered to verify that the "chain of custody" was unbroken during that time. In fact, nothing more than multi-layered hearsay was used to describe the handling of the evidence during the time preceding its arrival in New York. No testimony was offered by anyone with first-hand knowledge of the first five exchanges of custody.

Such indifference to the requirement that the "chain of custody" of incriminating evidence be established by the prosecution is but one more reason why defendant's motion to suppress should have been granted (*People v. Bennett,* 47 A. D. 2d 322, 366 N. Y. S. 2d 639 [1st Dept. 1975]; *People v. Washington,* 46 N. Y. 2d 116, 385 N. E. 2d 593 [1978]; *People v. Nicoletti,* 34 N. Y. 2d 249, 313 N. E. 2d 336 [1974]; cf. *Chess v. Colonial Penn Ins. Co.,* 93 Misc. 2d 765, 403 N. Y. S. 2d 765).

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*And, as the Court will recall (p. 4 herein), the contraband was never turned over to defendant nor was she in possession of it at the time of her arrest.

CONCLUSION.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Dated: New York, N. Y.,
September 30, 1980.

Respectfully submitted,

DAVID EDELMAN,
Attorney for Petitioner.

DAVID EDELMAN,
LAWRENCE R. SCHOENFELD,
JERRY V. WEINBERG,
Of Counsel.

APPENDIX.

Opinion of Court of Appeals.

COURT OF APPEALS,

STATE OF NEW YORK.

2

No. 190

THE PEOPLE &c.,

Respondent,

v.

JOY ADLER,

Appellant.

(190) David Edelman & Jerry V. Weinberg, NY City, for appellant.

John J. Santucci, DA, Queens County (Ivan K. Chesler & Charles N. Walsh of counsel) for respondent.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v JOY ADLER, Appellant.

Argued March 21, 1980; decided July 3, 1980

SUMMARY

APPEAL, by permission of an Associate Judge of the Court of Appeals, from an order of the Appellate Division of the Supreme Court in the Second Judicial Department, entered May 7, 1979, which (1) modified, on the law, and, as modified, unanimously affirmed an order of the Supreme Court (RICHARD A. BROWN, J.), entered in Queens County, granting in part and denying in part defendant's motion to suppress certain physical evidence, and (2) dismissed defendant's cross appeal from said order. The modification consisted of denying said motion in all respects.

On October 21, 1977 a United Airlines employee in Los Angeles informed the Los Angeles police that an individual had delivered a package addressed to "J. Adler" for shipment to New York, stating that it contained a vase. The individual appeared nervous and the employee, becoming suspicious, X-rayed the package. Suspecting hazardous material, he opened the package and discovered a large quantity of pills. So apprised, the police officer proceeded to the Los Angeles airport and took custody of the package. Laboratory analysis disclosed the presence of amphetamines and barbituates. The officer thereafter inscribed his initials, a number and the date on the inside of the package and returned it to the carrier for shipment to New York. Acting on this information, the New York police were present at Kennedy Airport when the flight touched down. One of the officers opened the package and discovered a quantity of pills, which he recognized as amphetamines and barbituates, as well as the markings placed there by the Los Angeles police officer. He delivered the container to the police precinct and had the drugs analyzed. The airline's personnel were instructed to inform anyone making inquiries

about the package that it had been lost in transit and was being traced. Following several inquiries, the consignee was told that the package could be picked up on the afternoon of October 24. That afternoon, defendant appeared at the airport to claim the package and, upon signing for the package and taking possession of it, she was arrested and searched. Found in defendant's pocketbook were a capsule, a pill and a small quantity of marihuana. There followed an indictment for two counts of criminal possession of a controlled substance in the third degree, two counts for such possession in the seventh degree and one for unlawful possession of marihuana. Based upon allegedly improper police activity prior to her arrest, defendant sought to suppress the physical evidence found in her possession. She was successful at Criminal Term as to the bundle's contents. The Appellate Division modified so as to deny suppression of the contents of the package and the handbag.

The Court of Appeals affirmed, holding, in an opinion by Chief Judge Cooke, that defendant's cross appeal from that part of the order denying suppression of the contents of her handbag was properly dismissed, that, considered as a search discrete from that in Los Angeles, the New York police action was violative of the Fourth Amendment proscription against warrantless searches, but that, when viewed in conjunction with the prior, valid search and seizure accomplished at the airline terminal in Los Angeles and the continuity of police control throughout, said search and seizure of the package at its New York destination was not constitutionally offensive.

People v Adler, 70 AD2d 599, affirmed.

OPINION OF THE COURT

Chief Judge COOKE.

[1] The warrantless police search and seizure of a parcel at its Kennedy Airport destination, when viewed in conjunction with a prior valid search and seizure accomplished at an airline terminal in Los Angeles and the continuity of police control throughout, was not constitutionally offensive.

Defendant was arrested at Kennedy after she retrieved a package shipped by air to her from California. The package was seized, her handbag was searched and narcotics were found in both. There followed an indictment for two counts of criminal possession of a controlled substance in the third degree, two for such possession in the seventh degree and one for unlawful possession of marihuana.

[1, 2] Based on allegedly improper police activity prior to her arrest, defendant sought to suppress the physical evidence found in her possession. She was successful at Criminal Term as to the bundle's contents, but the Appellate Division modified so as to deny suppression in the entirety.[1] There should be an affirmance.

At the suppression hearing, the events leading to defendant's arrest were related by Officer David McCarthy of the Queens Narcotics Bureau. A report of the Los Angeles Police Department, dated October 21, 1977, describing the events in California was also received. Without objection, McCarthy testified that on October 21 a message was received from an agent of the Federal Drug Enforcement Administration notifying the Queens bureau of the shipment to New York of a quantity of narcotics from Los Angeles addressed to "J. Adler" on United Airlines flight No. 8 scheduled to arrive that evening. Following receipt of this message, a member of the Queens bureau contacted Los Angeles Police Officer Lott, the source of the Drug Enforcement Administration report, to

1. [2] The Appellate Division dismissed defendant's cross appeal concerning the denial of the motion to suppress the evidence found in her handbag on the ground that no statutory authority supported such an appeal. There was no error in this respect (see CPL 450.10, 450.15; compare CPL 450.20, subd 8).

obtain additional information about the shipment. Lott described the package in detail and recounted how the contraband was discovered. A United Airlines employee in Los Angeles, one Orr, informed Lott that an individual had delivered the package for shipment, stating that it contained a vase. The individual appeared nervous and Orr, becoming suspicious, X-rayed the package. Suspecting hazardous material, Orr opened the package and discovered a large quantity of pills. So apprised, Officer Lott proceeded to the Los Angeles airport and took custody of the package. Laboratory analysis disclosed the presence of amphetamines and barbituates. Lott thereafter inscribed his initials, a number and the date on the inside of the package and returned it to the carrier for shipment to New York.

McCarthy and two fellow officers were present at Kennedy when United flight No. 8 touched down at 8:45 P.M. No inquiries concerning the package were made by 11:30 that evening. McCarthy then opened the item and discovered a quantity of pills, which he recognized as amphetamines and barbituates, as well as the markings placed by Officer Lott. McCarthy delivered the container to the police precinct and had the drugs analyzed. United's personnel were instructed to inform anyone making inquiries about the package that it had been lost in transit and was being traced. Following several inquiries, the consignee was told that the package could be picked up in the afternoon of October 24. That afternoon, defendant appeared at the airport to claim the package and, upon signing for the package and taking possession of it, she was arrested and searched. Found in defendant's pocketbook were a capsule, a pill and a small quantity of marihuana.

Crediting the People's evidence, Criminal Term concluded that the New York police had probable cause to arrest defendant and seize the package and that the initial search of it in Los Angeles was proper. However, the subsequent search in New York without a warrant, two days prior to defendant's arrest, was held improper. Determining that probable cause to arrest existed independent of the tainted search and that the search of defendant's pocketbook was valid as incident to a lawful arrest, Criminal Term suppressed only the evidence found in the package.

On appeal by the People pursuant to CPL 450.20 (subd 8) and 450.50, the Appellate Division agreed that the inspection of the package by the airline agent and the Los Angeles officer was proper. The court ruled in addition that the subsequent action of the New York police was also permissible on the theory that the New York events were simply a continuation of the lawful seizure in Los Angeles and, consequently, the motion to suppress the contents of the package was denied.

[3, 4] Considered as a search discrete from that in Los Angeles, the New York police action was violative of the Fourth Amendment proscription against warrantless searches. Certainly, defendant had a legitimate privacy interest in the contents of the package addressed to her (see *United States v Van Leeuwen,* 397 US 249). Armed with ample information to support a probable cause determination, the police undoubtedly could have obtained a warrant. At least the initial search, effected two days prior to defendant's arrest, cannot be justified as an incident thereto (see *Coolidge v New Hampshire,* 403 US 443, 457; compare *People v De Santis,* 46 NY2d 82; *United States v Garcia,* 605 F2d 349). Nor is there justification in the People's claim of exigency based on the arrival of the flight and the desire to avoid alerting the recipient. Even if such a claim were valid, the argument loses force when viewed in light of the apparent lack of concern for delay, as evidenced by the instruction simply to inform persons inquiring of the package that it had been lost and was being traced. However, assuming that the seizure of the package could be justified by some exigency existing in New York, the warrantless search of the package following the seizure was improper. At that point, no demanding circumstances existed to justify an immediate search, for the property then was within the control of the police. And, where exigency is employed to justify a seizure but the threat of harm or of destruction of evidence has been neutralized by police dominion over the property, the Fourth Amendment mandates the intervention of a detached Magistrate and the issuance of a warrant before there occurs a further intrusion on an individual's privacy interests (*Arkansas v Sanders,* 442 US 753; *United States v Chadwick,* 433 US 1).

[1] While the New York warrantless search, standing alone, cannot be supported, that search must be viewed in connection with the antecedent search and seizure in Los Angeles, which, as both courts below found, was properly effected.[2] It is well settled that a search by a private person, even an unlawful search, does not implicate Fourth Amendment considerations (*People v Gleeson,* 36 NY2d 462, 465; *People v Horman,* 22 NY2d 378, 381-382; *Burdeau v McDowell,* 256 US 465, 475). True, private conduct may be so imbued with governmental involvement that it loses its character as such and calls into play the full panoply of Fourth Amendment protections (see *People v Esposito,* 37 NY2d 156, 160; *Corngold v United States,* 367 F2d 1), but here there was no governmental involvement until after the private search revealed the presence of contraband. The agent's action, taken not in furtherance of some objective of the government but on behalf of the airline, was private conduct not subject to Fourth Amendment challenge (see *People v De Santis,* 46 NY2d 82, *supra; United States v Pryba,* 502 F2d 391, 398, cert den 419 US 1127).[3]

Nor did the airline employee become an agent of the police merely by surrendering the package to Officer Lott. A citizen who discovers contraband in his private capacity does not become a police agent simply by relinquishing the suspected contraband to the authorities. Here, the existence of illicit drugs had been discovered in the course of a private search; any invasion of defendant's privacy interests was complete at that point. No new or different search was effected by the immediate surrender to and inspection by the police officer (see *United States v McDaniel,* 574 F2d 1224, cert den 441 US

2. We note the dissent's dissatisfaction with the hearing procedure in this case. At no time, however, has defendant urged that her due process rights were violated by the use of hearsay. Indeed, there was no objection to the presentation of proof and no request either for the production of the airline agent or Officer Lott or for an adjournment to contact these witnesses. Thus, we need not pass upon the procedural questions suggested by the dissent.

3. The dissent disputes the validity of the finding that the agent acted in the interest of the airline rather than the authorities. However, that finding, affirmed by the Appellate Division, is supported by the record and should not now be disturbed. Particularly in the absence of some basis for believing that the agent acted at the behest of the police, the People were not required to negate further the possibility of a police motive.

952; *United States v Blanton,* 479 F2d 327). Indeed, the Fourth Amendment simply was not implicated by the voluntary transfer of the package to the police, for no governmental seizure in the constitutional sense exists in such a situation (see *United States v Sherwin,* 539 F2d 1, cert den 437 US 909). The police did not go beyond the private search when they examined the contents of the package (cf. *Walter v United States,* 447 US —, 48 USLW 4807 [STEVENS and STEWART, JJ.]).[4] It is thus immaterial whether the airline agent knew or reasonably suspected the illicit nature of the package's contents, or whether the package remained open when the police arrived in response to the agent's call (see *United States v Blanton,* 479 F2d 327, 327-328, *supra* [airline employees suspected but were not sure that the object found in an attaché case was a silencer for a firearm]). This case does not involve a closed container in the constitutional sense, for the container in which the drugs were found had been opened and examined by the airline agent. The police intruded upon no privacy interest not already invaded by the private party and thus lawfully seized the evidence proffered.

Regarding the New York police conduct as a continuation of the episode in California, there is no infirmity. When the Los Angeles police took custody of the property, the package legitimately was withdrawn from the stream of transit from the sender to the addressee and was lawfully under the control of the Los Angeles Police Department. Although that department thereafter sent the package on to New York, in no sense was the property returned to the original stream of transit. Rather, described in detail and marked by the Los Angeles inspector, it continued on to New York effectively

4. That the drugs were subjected to laboratory analysis does not alter the nature of the seizure. The drugs, the nature of which was reasonably self-evident, were already lawfully in the possession of the police. Unless we are prepared to hold that there is a reasonable and justifiable expectation of privacy in the contents of a pill capsule, it cannot be said that an intrusion into privacy interests was effected by scientifically examining the drugs. Indeed to read *Walter* to require a warrant at this point would result in a mandate that the police obtain a warrant whenever legally seized drugs are to be subjected to analysis. We do not read *Walter,* involving as it did First Amendment considerations and a general exploratory viewing of films contained within separate sealed boxes, as compelling that result.

under the dominion of the authorities. That the identity of the authority exerting control changed upon arrival of the parcel does not signify a break in the police chain of dominion. There can be no meaningful distinction between the events as they occurred and a situation where a police officer accompanies the package, physically transfers the property to another officer who examines it and thereafter sees it delivered to the intended recipient. Nor does the relinquishment of physical possession to United Airlines for the flight to New York serve to break the chain, for the police exerted control over the package both before and after the flight with no other intervening events. Thus, when the New York police searched the package, there was no independent intrusion requiring a warrant, but simply a continuation of the valid search and seizure effected in Los Angeles (see *United States v De Berry*, 487 F2d 448; *United States v Ford*, 525 F2d 1308; *McConnell v State*, 595 P2d 147 [Alaska], cert den *sub nom. McConnell v Alaska*, — US —, 100 S Ct 235; *State v Pohle*, 166 NJ Super 504, cert den 81 NJ 328).

Of course, not all searches of this nature can be so justified. The control exerted by the police after an initial search must remain effectively unbroken. If by a break the property returns to the original stream of transit, the police may not search or seize the property in the absence of independent justification cognizable under the Fourth Amendment (see *United States v Edwards*, 602 F2d 458, 467, n 9). The property here, however, once lawfully seized and under continuous police control, simply was permitted to come into the suspect's hands as bait in a trap set not by the police but apparently by the suspect herself. Under the circumstances presented, there was no constitutional infirmity.

Accordingly, the order of the Appellate Division should be affirmed.

JONES, J. (concurring). I agree that there should be an affirmance of defendant's conviction and for the reasons stated by the majority, except that I do not concur in its treatment of the recent decision of the United States Supreme Court in *Walter v United States* (447 US —, 48 USLW 4807).

I cannot subscribe to the implication in the majority opinion (p 737, n 4, and associated text) apparently distinguishing *Walter* on the ground that there is an analytical difference, for purposes of application of the constitutional provisions prescribing the right of the people to be secure against unreasonable searches, between a verification of the contents of the labeled boxes of film in that case by projection of the films and a verification of the contents of the pills in this case by chemical testing. If the position stated in the opinions of Mr. Justice STEVENS and Mr. Justice STEWART were taken to be a statement of the present law, I would conclude that there should be a reversal in this case.

With members of the Supreme Court divided as they were in *Walter,* however, both as to result and as to predicate rationale, I do not know whether *Walter* should be deemed to control our disposition in this case. Accordingly, with greatest respect, for that reason I am constrained to conclude that we should determine that the decision in *Walter* does not govern this appeal.

MEYER, J. (dissenting in part). Respectfully I dissent from so much of the Appellate Division's order as modified Criminal Term's suppression of the contents of the package. The majority concedes, and I agree, that considered separately from the Los Angeles seizure, the action of the New York police constituted an unlawful search. I agree also that a search by a private person is not within the constraints of the Fourth Amendment, so long as that person acts in his own interest and not as an agent or in the interest of the government, and that the fact that an airline tariff provision permits an airline employee to open a package shipped air freight is not, by itself, sufficient to constitute government involvement in the opening of a package by an airline employee (see, generally, Ringel, Searches and Seizures, Arrests and Confessions [2d ed], §§ 2.3, 16.2; Admissibility, in Criminal Case, of Evidence Obtained By Search By Private Individual, Ann., 36 ALR3d [supp, § 6.5]). Moreover, I concede that there is nothing evil per se in co-operation between an airline aware that it has possession of contraband and the police of the area in which the discovery is made or between law enforcement personnel

(State or Federal) of that area and their counterparts in the area of destination. Contraband validly seized at the point of shipment does not lose its police custody status because it is returned to the airline for transportation or until such time as it leaves police-airline custody (as, for example, by delivery to the recipient, *United States v Edwards,* 602 F2d 458). Absent such a break in custody, therefore, arrest of the recipient at the point of destination when he seeks to take possession of the package, suitcase, footlocker or similar container in which the contraband was shipped will generally be proper and "seizure" of the contraband at that point, because it is but the continuation of the earlier valid seizure, need not be otherwise justified.

Having said all of that I nevertheless cannot accept the conclusion of the majority that the evidence here presented demonstrates the validity of the Los Angeles search or permits the inferences (necessary to the result it reaches) that the majority draws. I am troubled also, apart from the insufficiency of the evidence, by its evident unreliability.

Warrantless searches or seizures are, as we held in *People v Hodge* (44 NY2d 553, 557), presumptively unreasonable per se and it is the People who have the burden of overcoming that presumption *(id.; Coolidge v New Hampshire,* 403 US 443, 455; *People v Wise,* 46 NY2d 321, 329; cf. *People v Di Stefano,* 38 NY2d 640, 652).[1] It was, therefore, the People's burden to show that the Los Angeles handling of the parcel, upon which the majority relies, was proper (see *United States v Ford,* 525 F2d 1308, 1313). The majority's holding that the warrantless Los Angeles seizure was constitutionally proper rests upon its legal conclusion that there was "no governmental seizure in the constitutional sense" in the handling of the package by the Los Angeles police after receipt of it from airlines agent Orr (p 737), and its inferences that "the private search revealed the presence of contraband" (p 737) and that the airlines agent's action was not taken in furtherance of some governmental objective (p 737). The legal conclusion is irrelevant because it is the propriety of the search not

1. The majority's footnote 3 turns the presumption referred to in the cited cases on its head.

whether there was a seizure that governs. Nor are the majority's factual inferences warranted.

The legal conclusion must be viewed in light of the Supreme Court's June 20, 1980 decision in *Walter v United States* (447 US —, 48 USLW 4807). There a package of obscene film was misdelivered by the carrier to a company with a name similar to that of the consignee. Having opened the cartons and believing from the labels and suggestive drawings on the individual boxes of film contained in them that they contained obscene film, but being unable because of the size of the film to determine the actual content of the film without a projector, the recipient called an FBI agent, who picked them up and, thereafter, without obtaining a warrant, viewed the films with a projector.

Defendant's motion to suppress was denied and the Fifth Circuit Court of Appeals by a divided court affirmed. The Supreme Court reversed, the majority concluding that there was in the FBI's viewing of the film "an unreasonable invasion of their owner's constitutionally protected interest in privacy" (447 US —, —, —, 48 USLW 4807, 4808, 4811, *supra*). The court split 5 to 4, with Mr. Justice MARSHALL concurring in the judgment without stating his reason for so doing, Justices STEVENS and STEWART joining in an opinion holding that, assuming there was no seizure there was nevertheless an improper search, and Justices WHITE and BRENNAN taking the view that even if the recipient had projected the films before turning them over to the Government, the Government still would have been required to obtain a warrant for its subsequent screening of them. The STEVENS opinion pointed out that an officer's authority to possess a package is distinct from his authority to examine its contents, that the Government may not exceed the scope of the private search unless it has the right to make an independent search, and that the opening of the cartons by a third party "does not alter the consignor's legitimate expectation of privacy. The private search merely frustrated that expectation in part. It did not simply strip the remaining unfrustrated portion of that expectation of all Fourth Amendment protection." It concluded that "[s]ince the additional search conducted by the FBI—the

screening of the films—was not supported by any justification, it violated that Amendment" (447 US, at p 742, 48 USLW, at p 4810).[2] The WHITE opinion agreed that the warrantless projection of the films constituted a search despite the fact that the Government had acquired the films from a private party, stating flatly that "The notion that private searches insulate from Fourth Amendment scrutiny subsequent governmental searches of the same or lesser scope is inconsistent with traditional Fourth Amendment principles" *(id.)*.

While there were prior to the *Walter* decision cases holding it immaterial whether a package was open or closed when the private searcher turned it over to the police officer *(People v McKinnon,* 7 Cal 3d 899, 915-916; *United States v Pryba,* 502 F2d 391, 401; *United States v Blanton,* 479 F2d 327, 328-329), the authority of those cases is now seriously in question.[3] Moreover, there were as many if not more cases holding or implying that the circumstances attending the officer's possession of the property bear materially on the constitutionality of his search of it, including several on which the majority rely. Thus, *McConnell v State* (595 P2d 147 [Alaska], cert den *sub nom. McConnell v Alaska,* — US —, 100 S Ct 235) held no more than that "law enforcement officials must come into lawful possession of the contraband. *Seizure of contraband*

2. The majority distinguishes the *Walter* case (p — —), claiming that it involved First Amendment considerations and that in the present case the police did not go beyond the private search. But the First Amendment was mentioned only to emphasize the importance of scrupulous observation of the general Fourth Amendment principle that "an officer's authority to possess a package is distinct from his authority to examine its contents" (447 US, at p —, 48 USLW, at p 4809). The second distinction is no clearer. It is difficult to see a factual distinction between the screening of film as to the contents of which the private party suspected obscenity because of the labels and drawings and such visual inspection of the film as he could make and the chemical analysis by the police of pills which the private party suspected were narcotics. If the screening was an intrusion on privacy interest so was the analysis of defendant's pills.

3. In any event they can be distinguished on their facts: *McKinnon,* because the officer could see the shape of the marihuana brick and smell its odor (7 Cal 3d, at p 917); *Pryba,* because the record showed the box remained open (502 F2d, at p 401, n 66); *Blanton,* because the decision recites, though it attaches no apparent significance to the fact that, defendant arrived before the Federal officer, called his lawyer after being told the bag was being held for arrival of the Federal officer and was told to cooperate (479 F2d, at p 328).

after it is observed in plain view is one method of acquiring lawful possession" (595 P2d, at p 154; emphasis supplied).[4] The decision in *State v Pohle* (166 NJ Super 504, cert den 81 NJ 328) may be read as indicating that the contents were removed from the package before both were turned over to the police (see NJ Super, at pp 507, 513) and possibly that the airline employee was able to identify (cf. 166 NJ Super, at p 513) the contraband (described simply as "about 500 tablets, and a bundle of bills totaling $5,000", see 166 NJ Super, at p 507) before turning it over to the police. In *United States v Ford* (525 F2d 1308, 1312, *supra)* the court noted that it was "the duty of the officers to further investigate the open box * * * to determine whether the suspicious substance in plain view was in fact contraband." Thus, whether viewed in light of the *Walter* holding or the prior case law on which the majority rely, the warrantless search by the Los Angeles police was improper, unless airlines agent Orr in fact identified what the pills were, or there was an exigency justifying search without a warrant.

There is nothing to show that Orr had any basis for concluding that the pills he found were not wholly innocuous. The majority's finding that "the private search revealed the presence of contraband" is a quantum leap from the evidence presented by New York Police Officer McCarthy, the only witness presented. He testified that *he* identified the pills as amphetamines and barbituates from the markings of the capsules and his knowledge of the Physician's Desk Reference concerning the meaning of those markings, but as to the Los Angeles events he could only testify that Los Angeles Detective Lott told him that airline employee Orr "suspected narcotics" when he opened the package and found pills. What an airline employee observes cannot be equated with the observations of a police detective who has become an expert through long work in the narcotics field. To say that the airline employee's observations "revealed the presence of contra-

4. The majority does not rely on a plain view theory, but since *United States v De Berry* (487 F2d 448), on which it does rely, does *(id.,* at p 451), I note that "plain view *alone* is never enough to justify the warrantless seizure of evidence" *(Coolidge v New Hampshire,* 403 US 443, 468, *supra* [emphasis in original]; *People v Jackson,* 41 NY2d 146, 150; cf. *Walter v United States,* 447 US —, —, 48 USLW 4807, 4809, *supra).*

band" is, therefore, to allow a warrantless seizure on nothing more than the airline employee's suspicion (see *United States v Haes,* 551 F2d 767, 771; cf. *United States v Rodriguez,* 596 F2d 169, 174; but see *People v De Santis,* 46 NY2d 82, 86). Yet if one thing is clear in Fourth Amendment law it is that the major purpose of the amendment was to forestall search or seizure based solely on rumor or suspicion.

Nor can Los Angeles Officer Lott's search be justified on the theory of exigent circumstances. The People argue that the package had been turned over to the airline for shipment on a particular flight. There is, however, nothing in the record to establish that the shipper instructed or requested that a particular flight be used. The Los Angeles police report in evidence shows only that at 9:20 A.M. a man "brought a pkg. to the United Airline ticket counter to be sent to Little Neck, N.Y." and that it was, in fact, "sent on United flight #8 to JFK Airport LAX (1200 hours), arrival at JFK (2015 hours)." The People also contend, based on *United States v Ford* (525 F2d 1308, *supra),* that exigency can be found in the possibility that failure to ship the contraband promptly may have alerted the New York consignee (defendant) and thus frustrated the investigation and arrest process. The contention overlooks the airline tariff provision (referred to in *People v McGrew,* 1 Cal 3d 404, 410, cert den 398 US 909; and *People v McKinnon,* 7 Cal 3d 899, 906, cert den 411 US 931, *supra)* permitting shipment on a "space available" basis, a possibility which it is essential for the People to negate in the first instance if the presumption against validity of a warrantless seizure is to retain any meaning.

The majority disposes of any agency issue by stating (p 737) that the airline employee's action was "taken not in furtherance of some objective of the government but on behalf of the airline". While there is nothing in the record to show that United Airlines employee Orr had been previously known to Los Angeles Police Investigator Lott, there also is nothing to show that he had not acted in many prior instances in the same capacity or that he was not acting in this particular instance at Lott's request. To overcome the presumption the People had to show not only that Orr could have (or even did) have an airline motive for opening the package, but also that he was not acting at the instigation or behest of the Los

Angeles police, whether as to the instant case or as a matter of general arrangement between them.[5] The issue is, however, nowhere touched upon in the exhibits or in the direct testimony. The only reference to agency was defendant's attorney's rather poignant question on cross-examination to McCarthy: "Did anyone inquire as to whether or not Mr. Orr had been requested by the law enforcement agencies in Los Angeles to look for such packages or to disclose to them that he had suspicious packages?" To that question McCarthy responded only "I don't know."

That response vividly illustrates the all but impossible burden on the defendant when the presumption of invalidity of a warrantless search is permitted to be overcome by evidence of the type here offered. Defendant's memorandum after the suppression hearing protested the type of information supplied to the New York police by the Los Angeles police. Notwithstanding the fact that CPL 710.60 (subd 4) makes hearsay "admissible to establish any material fact" in a suppression hearing, we have had occasion to comment on the necessity of the People producing a particular officer as a witness because of the danger of relying upon a "tenuously balanced * * * pyramid of hearsay" *(People v Havelka,* 45 NY2d 636, 641). Here, as noted, the sole witness at the suppression hearing was New York Police Officer McCarthy. He testified that the Queens Narcotics area office received a telephone message from Drug Enforcement Agency Officer Perori at Kennedy Airport that Investigator Lott of the Los

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5. That the airline employee at the point of shipment is often dangerously close to acting as a government agent is suggested by *McConnell v State* (595 P2d 147, affd *sub nom. McConnell v Alaska,* — US —, 100 S Ct 235, *supra)* and *Snyder v State* (585 P2d 229 [both Alaska]) and *People v McKinnon* (7 Cal 3d 899, cert den 411 US 931, *supra),* the first two of which involved an airline employee who in two years uncovered drugs in 30 air shipments and testified that he opened 90 to 100 parcels per month, and the third of which concerned an employee who on four or five occasions in three years had opened packages and found marihuana and followed the practice of leaving the parcel open "so that when the police arrive 'there is no cause for illegal search or seizure.' " (7 Cal 3d, at p 904.) That in all three cases the finding on the particular facts was of nonagency does not mean that agency can never be spelled out as a matter of fact (cf. 1 La Fave, Search and Seizure, § 1.6).

Angeles police had alerted Perori to the parcel and that another officer of Queens Narcotics, probably Detective Rabacki, then telephoned Lott, who told that officer what airline employee Orr had said and done. Thus, McCarthy's testimony about Orr's acts is at least fourth-hand hearsay. Had Orr or Lott been produced as suppression hearing witnesses, the gaps in the evidence would not have existed.

Whether, notwithstanding the admissibility of hearsay at suppression hearings, fourth-hand hearsay is so unreliable that its use presents a due process problem it is not necessary now to decide. Clearly, the People have not come forward with proof sufficient to overcome the presumption. When to that fact is added the essential unreliability of the evidence they have produced, I have no hesitancy in applying the exclusionary rule to suppress the contraband.

For the foregoing reasons, I would hold both the New York seizure and the Los Angeles search in violation of defendant's constitutional rights and would, therefore, modify the order of the Appellate Division and reinstate the order suppressing the contents of the package *(People v Havelka,* 45 NY2d 636, 643-644, *supra).*

Judges JASEN, GABRIELLI, WACHTLER and FUCHSBERG concur with Chief Judge COOKE; Judge JONES concurs in a separate opinion; Judge MEYER dissents in part and votes to modify in an opinion.

Order affirmed.

Order Granting Leave to Appeal to the Court of Appeals.

COURT OF APPEALS,

STATE OF NEW YORK.

Before:

Hon. Matthew J. Jasen, Associate Judge.

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

against

JOY ADLER,

Appellant.

I, MATTHEW J. JASEN, Associate Judge of the Court of Appeals of the State of New York, do hereby certify that in the record and proceedings herein* questions of law are involved which ought to be reviewed by the Court of Appeals and pursuant to §460.20 of the Criminal Procedure Law, it is therefore

ORDERED that permission be and it is hereby granted to the above-named appellant to appeal to the Court of Appeals.

Dated at Buffalo, New York
June 29, 1979.

MATTHEW J. JASEN
Associate Judge

*Description of Order: Order of Appellate Division, Second Department, rendered May 7, 1979, dismissing defendant's cross appeal and modifying Supreme Court, Queens County, order dated May 16, 1978.

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Order of Criminal Term, Part 21.

SUPREME COURT, STATE OF NEW YORK,

QUEENS COUNTY,

Criminal Term Part 21,

25-10 Court Square Long Island City, N. Y. 11101.

Present:

Hon. Richard A. Brown, Justice.

THE PEOPLE OF THE STATE OF NEW YORK

against

JOY ADLER,

Defendant.

Ind. No. 8311-77

Motion to Suppress Evidence
Submitted March 16, 1978
Hearing February 23, 1978
David Edelman, Esq. For the Motion
Eric Sears A.D.A. Opposed

The following papers numbered 1 to 5 submitted in this motion.

	Papers Numbered
Notice of Motion and Affidavits/Affirmations Annexed	1-2
Answering and Reply Affidavits/Affirmations	3
Exhibits	4
Minutes of hearing	5

Upon the foregoing papers, defendant's motion is granted to the extent indicated in the accompanying memorandum dated May 16, 1978.

RICHARD A. BROWN
J. S. C.

Granted:
Date: May 16, 1978

Opinion of Criminal Term.

SUPREME COURT,

QUEENS COUNTY,

Criminal Term, Part 21.

THE PEOPLE OF THE STATE OF NEW YORK

against

JOY ADLER,

Defendant.

Ind. No. 8311-77

Dated May 16, 1978

By RICHARD A. BROWN, J.:

Defendant moves to suppress a quantity of amphetamines and barbiturates allegedly obtained through an unlawful search and seizure.

On February 23, 1978 a hearing was held at which Police Officer Daniel McCarthy of the New York City Police Department, Queens Narcotics Area, was the sole witness. Based upon the credible evidence adduced at the hearing, the Court makes the following findings of fact and reaches the following conclusions of law.

On Friday, October 21, 1977 at 2:30 p.m. a telephone message was received in the office of the New York City

Police Department, Queens Narcotics Area, from the Federal Drug Enforcement Administration. The substance of the communication was that information had been received from the Los Angeles Police Department to the effect that a package addressed to a J. Adler at a specific address in Queens County contained a quantity of amphetamines and barbiturates and had been shipped on a United Airlines flight which was scheduled to arrive at JFK Airport at 8:15 p.m. that evening.

Later that afternoon, an officer of the Queens Narcotics Area telephoned the Los Angeles police and was advised that a United Airlines agent in Los Angeles had earlier that day received a package for shipment to New York of which he had become suspicious and which he had X-rayed. Not finding the items claimed to have been shipped and believing that the package might contain hazardous materials, the agent opened the package and discovered that it contained a quantity of pills.

The Los Angeles police were summoned, conducted an analysis of the pills and found that they were barbiturates and amphetamines. The package, which had been wrapped in brown paper with writing in green ink, was resealed and initials, identifying numbers and writings were placed inside. A copy of the written investigative report of the Los Angeles Police Department concerning the case, which was received by the New York City Police Department subsequent to the events described herein, was received in evidence at the hearing.

Later that same evening, officers of the Queens Narcotics Area proceeded to JFK Airport. The United Airlines flight arrived at 8:45 p.m. and the officers, who were at the unloading of the airplane, observed the package, initialled it and placed it on a luggage escalator. Shortly thereafter, at about 9 p.m., Police Officer McCarthy, dressed as a United Airlines employee, took custody of the package at the Passenger Service Department.

At about 11:30 p.m., after no one inquired about the package or appeared to claim it, Police Officer McCarthy opened the package. Contained therein was a Mexican doll, 350 black capsules, 90 white capsules with blue stripes, 94 white pills with green specks, one white cardboard box marked 10/21/77, D.W.L. and the numbers 41319. Police Officer McCarthy recognized the pills to be amphetamines and barbiturates. Written on the brown paper wrapping in green ink was the following: "From R. Bounty 5733 Onion Street, Enrico, California" and "To J. Adler or I Nodstrom" Little Neck, New York.

At the time Police Officer McCarthy opened the package he did not believe that it contained any weapons or explosives, he did not feel that the contents of the package presented any immediate threat to him or anyone else and he had neither obtained nor sought a search warrant.

After opening the package and discovering the pills, Officer McCarthy proceeded with the package and its contents to the 113th Precinct where they were vouchered. He then delivered the pills to the police laboratory for analysis and went off duty until the following Monday morning.

At 7 a.m. the following morning, Saturday, October 22, 1977, a female appeared at the United Airlines Terminal to claim the package. In accordance with the instructions of Police Officer McCarthy, the agent advised her that the package had been lost and that a trace would be placed on it. Additional inquiries were made later that day and on the following day, Sunday, October 23, 1977, at which time the female was advised that the package had been located and would arrive at JFK Airport about 4:30 p.m. on Monday, October 24, 1977.

Early Monday morning, October 24, 1977, Police Officer McCarthy obtained the package containing the drugs from the police laboratory and brought it to the airport.

At about 5 p.m. that afternoon, the defendant approached Police Officer McCarthy, who was again dressed in a United Airlines uniform, and inquired about the package. She thereupon signed for the package and took custody of it and was arrested.

After defendant's arrest a search was made of her pocketbook. Found therein, was a vial containing one capsule, one pill, a partial marijuana cigarette and one rolled up imitation $100 bill with a residue of cocaine.

The initial search of the package by the United Airlines employee in Los Angeles was a search made in pursuit of a common carrier's right to inspect goods presented for shipment and is not constitutionally proscribed. *Bureau v. McDowell,* 256 U.S. 465, 41 S. Ct. 574 [1921]; *People v. Horman,* 22 N.Y. 2d 378, 292 N.Y.S. 2d 874 [1968]; *People v. DeSantis,* 59 AD 2d 257, 399 N.Y.S. 2d 514 [1977]. An airfreight shipper has the power to inspect all packages committed to its care for the purpose of ascertaining if the contents are lawful or hazardous. *United States v. DeBerry,* 487 F. 2d 448 [1973]. It was not improper for the airlines agent in Los Angeles, upon discovering that the package contained a quantity of pills and not the items claimed to have been shipped, to notify the Los Angeles police and for said authorities to examine the package and its contents.

The information received by the New York City Police Department from the Drug Enforcement Administration was an official police report which, on its face, constituted the requisite probable cause to justify the arrest of the defendant and the seizure of the package herein. *People v. Lypka,* 36 N.Y. 2d 210, 366 N.Y.S. 2d 622 [1975]. Additionally, the further telephone conversation with the Los Angeles police not only established the basis for the information received by them, but gave further detailed information.

The sum totality of police information, including the airline agent's observations, the Los Angeles investigation, the New York City Police Department's verification of the out-of-state events and the independent observations of the New York police officers, furnished reasonable cause to believe that a crime was being committed. It is clear that the police officers were in possession of "layers of information" which constituted probable cause for both the arrest of the defendant and the seizure of the package. *People v. Lypka, supra; People v. Tolentino,* 40 AD 2d 596, 335 N.Y.S. 2d 958 [1972].

But rather than simply rely upon the probable cause which they had to arrest the defendant and seize the package when she arrived to claim it, the New York City police authorities chose instead to open the package. By so doing, in my judgment, without having first obtained a search warrant, they violated defendant's constitutional right to be protected from unreasonable search and seizure.

The Fourth Amendment proscription against unreasonable search and seizure protects people, not places, from unreasonable governmental intrusion into their legitimate expectations of privacy. *Katz v. United States,* 389 U.S. 347, 19 L. Ed. 2d 576 [1962]. *United States v. Chadwick,* U.S. , 53 L. Ed. 2d 538 [1977]. The fundamental purpose of the Fourth Amendment is to safeguard individuals from unreasonable governmental invasions of legitimate privacy interests. This includes not only those interests found in the four walls of a home (*Wolf v. Colorado,* 338 U.S. 25, 69 S. Ct. 1349 [1949]), but packages sent through the mail (*United States v. Van Leeuwen,* 397 U.S. 249, 25 L. Ed. 2d 282 [1970]) and luggage sent by common carrier (*United States v. Chadwick, supra*). The defendant herein was reasonably entitled to expect that the contents of the package shipped to her, albeit by common carrier, would be protected from public examination.

In general, "unless there are exigent circumstances, police officers should ordinarily obtain search warrants before conducting a search". (Ringel, *Searches and Seizures,* 1976 supp., section 232, p. 214.) It is well settled that "where there is ample time for the law enforcement officials to secure a warrant, the warrantless seizure of evidence, even if it is in plain view, is forbidden." *People v. Spinelli,* 35 NY2d 77, 358 NYS 2d 743 [1974]; *People v. Jackson,* 41 NY2d 146, 391 NYS 2d 82 [1976]. A warrantless entry is not authorized absent exigent circumstances merely because probable cause exists that a crime is being committed. *People v. Sciacca,* 57 A.D. 2d 846, 393 NYS 2d 630 [1977].

In the *Chadwick* case, *supra,* defendants had shipped a foot locker by train from San Diego to Boston. Amtrak officials in San Diego became suspicious of the footlocker and notified federal agents in that city who relayed the information to their counterparts in Boston. Two days later when the train arrived, the locker was inspected by the use of a trained police dog who detected the odor of marijuana. Defendants subsequently claimed the trunk and had it placed in their car. They were thereafter arrested and the trunk was brought to Federal headquarters where it was opened. The Supreme Court held that:

> "By placing personal effects inside a double-locked footlocker, respondents manifested an expectation that the contents would remain free from public examination. No less than one who locks the doors of his home against intruders, one who safeguards his personal possessions in this manner is due the protection of the Fourth Amendment Warrant Clause. There being no exigency, it was unreasonable for the Government to conduct this search without the safeguards a judicial warrant provides."

Clearly, the police officers herein had ample time to secure a search warrant. The New York search took place some 9 hours after the initial search in Los Angeles and 2 days before the defendant's arrest. In a similar case (*G. M. Leasing Corp. v. United States,* U.S. , 50 L. Ed. 2d 550 [1977]), two agents of the Internal Revenue Service who were aware that certain records were in a defendant's place of business, waited two days and then seized the records. The Supreme Court, in response to the claim of exigent circumstances stated:

> ". . . the respondents assert that the facts of this case bring it within the exigent circumstances exception to the warrant requirement. The agents own actions, however, in their delay for two days following their first entry, and for more than one day following the observation of materials being moved from the office, before they made the entry during which they seized the records, is sufficient to support the District Court's implicit finding that there were no exigent circumstances in this case."

In the instant case Police Officer McCarthy did not believe, nor did he have any basis for believing, that the package contained weapons or explosives or posed a threat to any individual. Nor simply because this was an airport search can it be reasonably argued that the package could have been easily moved. Fourth Amendment rights are not suspended during, or as a result of, airplane flight. Any intrusion into one's privacy at an airport must be justified the same as anywhere else. The officers in this case, after the defendant failed to claim the package upon its arrival, could have either secured a search warrant or limited their search to a mere inspection of the outside of the package.

And the fact that the police officers were about to go off duty for the weekend in no way justified the failure to

secure a warrant. The rule of law is constant. The warrant clause of the Constitution is not suspended because the officers involved herein were not working Saturday or Sunday and such fact will not bring this case under the exigent circumstances exception thereby permitting the police action herein.

Under the circumstances of this case, the intrusion into privacy was excessive. The police officers not only took custody of the package at the airport but intruded upon it. They controlled the property thereafter for over a period of 48 hours before returning it to the airport. As was stated by the Supreme Court in *Chadwick, supra:*

> "Even though on this record the issuance of a warrant by a judicial officer was reasonably predictable, a line must be drawn. In our view, when no exigency is shown to support the need for immediate search, the Warrant Clause places the line at the point where the property to be searched comes under the exclusive dominion of police authority. Respondents were therefore entitled to the protection of the Warrant Clause with the evaluation of a neutral magistrate before their privacy interests in the contents of the foot locker were invaded."

Once the police officers in this case took custody of the package they had exclusive dominion and control. By searching the package at that time, they had crossed the line. They clearly exceeded their authority.

Two further points deserve consideration. The District Attorney argues that even if there was illegality in the search, it (1) is validated by the initial and proper search in Los Angeles and (2) the arrest of the defendant was inevitable and suppression should not lie.

As to the first contention, the prior valid intrusion in this case by the United Airlines agent cannot purge the

subsequent tainted search. A valid intrusion by a private person into a constitutionally protected area does not validate a subsequent unreasonable intrusion by a police authority absent some exigent circumstances. *People v. Gleeson,* 36 N.Y. 2d 462, 369 NYS 2d 113 [1975]. And, as pointed out above, no exigent circumstances exist herein.

The second argument is that the doctrine of inevitable discovery—an offshoot of the "fruit of the poisonous tree" exclusionary rule—applies herein. The rule is "that evidence obtained as a result of information derived from an unlawful search or other illegal police conduct is not inadmissible under the fruit of the poisonous tree doctrine where the normal course of police investigation would, in any case, even absent the illicit conduct, have inevitably led to such evidence." *People v. Fitzpatrick,* 32 NY2d 499, 346 NYS 2d 793 [1973], cert. den. 404 U.S. 1033.

As applied herein, the argument is that even though the search was improper, Officer McCarthy would have discovered the contraband in any event as an incident to the lawful arrest and subsequent search of the defendant and the package. But as articulated by the Court of Appeals in *Fitzpatrick, supra,* the doctrine applies only where the search is the result of an illegality and there exists another source for the search which in effect purges the taint. The doctrine of inevitable discovery does not apply where the search, as here, does not result from an illegality but is in and of itself improper. Inevitable discovery cannot be used as a substitute for a search warrant where a warrant is otherwise required. As was recently stated by the Appellate Division, Second Department, in *People v. Sciacca, supra,*

> "The assertion by police . . . that the discovery was 'inevitable' because they planned to get a search warrant and had sent an officer on such a mission, would as a practical matter be beyond

> judicial review. Any other view would tend in actual practice to emasculate the search warrant requirement of the Fourth Amendment." *United States v. Griffin,* 502 F. 2d 959 [1974], cert. den. 95 S. Ct. 626.

The theory of inevitable discovery cannot justify, in this case, the admission into evidence of the contraband drugs.

Accordingly, defendant's motion to suppress the contents of the package sent to JFK Airport is granted. However, the information secured from the Los Angeles authorities and the independent observations of the New York City police officers constituted probable cause to justify the arrest of the defendant and to search her purse. The removal of the contents of defendant's purse was an incident to a lawful arrest. Therefore, only the package is suppressed.

Order entered accordingly.

The Clerk of the Court is directed to forward a copy of this decision to the District Attorney and to the attorney for the defendant.

RICHARD A. BROWN
J. S. C.

Order of Appellate Division.

At a Term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, held in Kings County on May 7, 1979.

Hon. Frank D. O'Connor,
Justice Presiding,
Hon. Samuel Rabin,
Hon. J. Irwin Shapiro,
Hon. Guy J. Mangano,
Associate Justices.

THE PEOPLE OF THE STATE OF NEW YORK,

Appellant-respondent,

v.

JOY ADLER,

Respondent-appellant.

In the above entitled cause, the above named The People of the State of New York, plaintiff, and the above named Joy Adler, defendant, having cross appealed to this court from an order of the Supreme Court, Queens County, dated May 16, 1978, which, after a hearing, denied in part, and granted, in part, defendant's motion to suppress certain physical evidence; and the said appeal having been argued by Charles N. Walsh, Esq., of counsel

for the appellant, and argued by Jerry V. Weinberg, Esq., of counsel for the respondent, and due deliberation having been had thereon; and upon this court's opinion and decision slip heretofore filed and made a part hereof, it is:

ORDERED that the defendant's cross appeal is hereby dismissed, and it is further

ORDERED that the order appealed from is hereby modified, on the law, by deleting therefrom all the words following "defendant's motion is" and by substituting therefor the words "denied in all respects"; and, as so modified, said order unanimously affirmed.

Enter:

IRVING M. SELKIN
Clerk of the Appellate Division

Opinion of Appellate Division.

Frank D. O'Connor, J. P.
Samuel Rabin
J. Irwin Shapiro
Guy J. Mangano, JJ.

AD2d A-April 23, 1979

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THE PEOPLE, etc.,

appellant-respondent,

v.

JOY ADLER,

respondent-appellant.

(Ind. No. 8311-77)

John J. Santucci, District Attorney, Kew Gardens, N. Y. (Charles N. Walsh and Barry A. Schwartz of counsel), for appellant-respondent.

David Edelman, New York, N. Y. (Jerry V. Weinberg of counsel), for respondent-appellant.

The People and the defendant cross-appeal from an order of the Supreme Court, Queens County (Brown, J.),

dated May 16, 1978, which, after a hearing, denied in part, and granted, in part, defendant's motion to suppress certain physical evidence.

Defendant's cross appeal is dismissed. A defendant in a criminal action may not appeal from an intermediate order denying her motion to suppress evidence in whole or in part (see CPL 450.10, 450.15; cf. CPL 450.20).

Order modified, on the law, by deleting therefrom all the words following "defendant's motion is" and by substituting therefor the words "denied in all respects" and as so modified, order unanimously affirmed.

We agree with Criminal Term's conclusion that the inspection by the airline agent and the Los Angeles police of the contraband in Los Angeles was proper. Such action constituted a lawful seizure in Los Angeles which continued throughout the ensuing events (see *United States v. DeBerry,* 487 F2d 448). Accordingly, the opening of the package and the analysis of its contents by the New York Police Department served only to add cumulative facts, not additional bases for search and arrest, and did not act to invalidate otherwise lawful and proper police work. The California seizure having been accomplished in a manner consistent with the defendant's Fourth Amendment right to be free of unreasonable search and seizure, it provided a proper and adequate predicate for defendant's warrantless arrest in New York and the subsequent reclaiming of the previously seized evidence as an incident of that lawful arrest (see *United States v. DeBerry, supra*). Though not properly before us, we would note that defendant's cross appeal raises the issue of whether certain contraband found in her pocketbook upon her arrest should have been suppressed. Since this constituted evidence seized pursuant to an otherwise lawful arrest, suppression would have been improper.

O'Connor, J. P., Rabin, Shapiro and Mangano, JJ., concur.

Remittitur of the New York State Court of Appeals.

COURT OF APPEALS,

STATE OF NEW YORK.

The Hon. Lawrence H. Cooke, Chief Judge, Presiding

2 No. 190

THE PEOPLE &c.,

Respondent,

v.

JOY ADLER,

Appellant.

The appellant in the above entitled appeal appeared by David Edelman, the respondent appeared by John J. Santucci, District Attorney, Queens County.

The Court, after due deliberation, orders and adjudges that the order is affirmed. Opinion by Cooke, Ch. J. All concur, Jones, J., in a separate opinion; except Meyer, J., who dissents in part and votes to modify in an opinion.

The Court further orders that the papers required to be filed and this record of the proceedings in this Court be remitted to the Supreme Court, Queens County, there to be proceeded upon according to law.

I certify that the preceding contains a correct record of the proceedings in this appeal in the Court of Appeals and that the papers required to be filed are attached.

JOSEPH W. BELLACOSA
Clerk of the Court

Court of Appeals, Clerk's Office, Albany, July 3, 1980.

(Seal.)

Supreme Court, U. S.
FILED
NOV 3 1980
MICHAEL RODAK, JR., CLERK

No. 80-534

IN THE

Supreme Court of the United States

October Term, 1980

JOY ADLER,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals of the State of New York

BRIEF FOR THE PEOPLE OF THE STATE OF NEW YORK IN OPPOSITION

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TABLE OF CONTENTS

	PAGE
Introduction	1
Opinion Below	2
Jurisdiction	2
Statutes Involved	3
Statement of Facts	3
Point One—This Court is without jurisdiction to grant a petition for *certiorari* at this stage of the litigation	3
Point Two—The determination of the court below is to clearly correct that no further review is necessary	6
Conclusion	7

TABLE OF AUTHORITIES

PAGE

Cases:

Abelman v. Booth, 62 U.S. 506 2

Burdeau v. McDowell, 256 U.S. 465 6

Chapman v. California, 405 U.S. 1020 4
Cohens v. Virginia, 19 U.S. 264 2
Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 5

Martin v. Hunter, 14 U.S. 304 2

Walter v. United States, —— U.S. ——, 65 L.Ed.2d 410 6

Statute:

28 U.S.C. §1257(3) 3

Other Authorities:

Constitution of the United States, Amendment One 5

Constitution of the United States, Amendment Four .. 5

Stern & Gressman, *Supreme Court Practice,* 5th Ed., p. 195 4

No. 80-534

IN THE

Supreme Court of the United States

October Term, 1980

JOY ADLER,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals of the State of New York

BRIEF FOR THE PEOPLE OF THE STATE OF NEW YORK IN OPPOSITION

Introduction

This is a brief in behalf of respondent in opposition to a petition for a writ of *certiorari* to the Court of Appeals of the State of New York.

On February 14, 1977, petitioner was charged with the crimes of criminal possession of a controlled substance in the third degree (2 counts), criminal possession of a con-

trolled substance in the seventh degree and unlawful possession of marijuana under Indictment No. 8311 of 1977. On or about May 16, 1978, the Hon. Richard A. Brown, a Justice of the Supreme Court of the State of New York, ordered the suppression of certain evidence seized in connection with this case [see petitioner's appendix, p. 22A]. The District Attorney appealed the adverse portion of Mr. Justice Brown's order to the Supreme Court of the State of New York, Appellate Division, Second Judicial Department. On May 7, 1979, the Appellate Division modified Mr. Justice Brown's order by denying the motion to suppress in all respects [petitioner's appendix, p. 32A]. At this juncture petitioner had the option of either proceeding to trial or disposition of the case or appealing to the Court of Appeals. Petitioner chose to appeal the case to the Court of Appeals and on or about July 3, 1980, the Court of Appeals of the State of New York affirmed the order of the Appellate Division [see petitioner's appendix, pp. 4A *et seq.*]. The instant petition for *certiorari* is from that order and opinion.

Opinion Below

The opinion of the New York Court of Appeals is reported at 50 N.Y.2d 730 (1980).

Jurisdiction

The jurisdiction of this Court is invoked by petitioner under Article 3, Sec. 2, Clause 2 of the United States Constitution; *Martin* v. *Hunter,* 14 U.S. 304; *Cohens* v. *Virginia,* 19 U.S. 264; *Abelman* v. *Booth,* 62 U.S. 506.

Statutes Involved

The Constitution of the United States, Amendment Four.

Statement of Facts

The statement of facts, as set forth in the opinion of the Hon. Lawrence J. Cooke, Chief Judge of the New York State Court of Appeals, in the opinion of the court below, as set forth in petitioner's appendix, p. 4A *et seq.*, is adopted herein by respondent.

POINT ONE

This Court is without jurisdiction to grant a petition for *certiorari* at this stage of the litigation.

Although petitioner does not rely upon it to allege jurisdiction, it is clear that the procedural vehicle by which he must sustain jurisdiction is found at 28 U.S.C. §1257(3), which reads as follows:

> *Final Judgments* or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court as follows:
> . . .
> (3) by writ of *certiorari*, . . . where any title, right, privilege or immunity is specially set up or claimed under the Constitution . . . .

Thus, in order for the petitioner to invoke the jurisdiction of this Court, she must overcome the procedural hurdle of "finality of judgment." Given the posture of the litiga-

tion that has thus far proceeded in this case, it is respectfully submitted that petitioner will be unable to overcome this hurdle.

> The final judgment in a criminal proceeding is the sentence. *Berman* v. *United States,* 302 U.S. 211; *Parr* v. *United States,* 351 U.S. 513, 518. Hence a state court judgment which merely overrules a plea in bar, or a demurrer to an indictment, or denies a preliminary hearing, or disposes of a motion relating to admission of evidence lacks the finality necessary to support review by the Supreme Court. See *Eastman* v. *Ohio,* 299 U.S. 505 (plea or res judicata); *Polakow's Realty Experts, Inc.* v. *Alabama,* 319 U.S. 750 (demurrer); *Arcenaux* v. *Louisiana,* 376 U.S. 336 (preliminary hearing); *Chapman* v. *California,* 405 U.S. 1020 (pretrial motion to suppress evidence and to return seized property); and see *Wilson* v. *Schnettler,* 365 U.S. 381, 384-385 (preliminary motion to suppress use of evidence at trial). Stern & Gressman, *Supreme Court Practice,* 5th Ed., page 195.

Chapman v. *California, supra,* is, in its procedural history, remarkably similar to the case at bar. Both cases involved interlocutory appeals from the order of suppression in the trial court. In both cases, the highest court in the state ultimately denied the motion to suppress. Chapman's petition was denied by this Court on the specific ground that the state court decision was not final. Respondent submits that the *Chapman* case is controlling.

It is also worth noting that the dissenters in the *Chapman* opinion, who would have granted *ceriorari,* focused primarily on the fact that the case involved not only the

Fourth Amendment but the First Amendment as well. As Mr. Justice Douglas wrote,

> *Mills* v. *Alabama* . . . (384 U.S. 214) teaches that where First Amendment rights are involved, compliance with procedural formalities before allowing their vindication in this Court is not necessary unless those procedures are meaningful.
>
> I will follow *Mills* and grant the petition for a writ of *certiorari* and put the case down for argument. (Citation added.)

It is clear that a prime motivation for Mr. Justice Douglas' dissent from the *Chapman* opinion focused upon the First Amendment ramifications of the case. The case at bar, having no such First Amendment ramifications, presents an even stronger one to justify the conclusion that the petitioner's claim of jurisdiction must fail because of the absence of "finality of judgment."

Cox Broadcasting Corp. v. *Cohn,* 420 U.S. 469 (1975) is of no help to petitioner. In accepting jurisdiction to review that judgment, the Court stated,

> The Georgia Supreme Court's judgment is plainly final on the federal issue and is not subject to further review in the state courts . . . [E]ven if appellants [the press] prevailed at trial and made unnecessary further consideration of the constitutional question, there would remain in effect the unreviewed decision of the State Supreme Court that a civil action for publishing the name of a rape victim disclosed in a public judicial proceeding may go forward despite the First and Fourteenth Amendments. Delaying final decision on the First Amendment claim until after trial . . . will leave the press in Georgia operating in the shadow of the civil and criminal sanctions of a rule of law and

a statute the constitutionality of which is in serious doubt (420 U.S. at 485-486).

It is clear that much remains to be determined in connection with this case. Petitioner may demand a full trial on the issue of guilt or innocence. It cannot be said that the denial of a motion to suppress is in any way dispositive of that question. Accordingly, the instant petition should be denied as being jurisdictionally defective.

POINT TWO

The determination of the court below is so clearly correct that no further review is necessary.

Because we are persuaded that the jurisdictional impediment is so clearly controlling, respondent will merely rely upon the opinion of the majority in the Court of Appeals as to the merits of petitioner's case. We would simply add the following brief comment.

Should this Court adopt the notion that *Walter* v. *United States* (—— U.S. ——, 65 L.Ed.2d 410) prohibits the kind of police activity engaged in herein, almost no physical evidence voluntarily turned over to the police by concerned citizens could be utilized by the police in the absence of a warrant. All drugs must be submitted to laboratory tests, all weapons tested for operability, and all stolen property must ultimately be returned to its rightful owner. In short, to apply *Walter, supra,* to this case would substantially eliminate the long-standing doctrine that the exclusionary rule is inapplicable to evidence obtained by private citizens. *Burdeau* v. *McDowell,* 256 U.S. 465 (1921).

Conclusion

The petition for a writ of *certiorari* should be denied.

Respectfully submitted,

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October, 1980

Supreme Court, U. S.
FILED
NOV 4 1980
MICHAEL RODAK, JR., CLERK

No. 80-534

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

JOY ADLER,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

Petition for a Writ of Certiorari to the Court of Appeals of the State of New York

PETITIONER'S REPLY BRIEF

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TABLE OF CONTENTS

	PAGE
POINT I—The petition is not jurisdictionally defective	1
POINT II—The petition presents an ample basis for review by this Court	4
CONCLUSION	4

Cases Cited

Chapman v. California, 405 U.S. 1020, 31 L Ed 2d 483, 92 S.Ct. 1284	2, 3
Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 95 S.Ct. 1029, 43 L Ed 2d 328 (1975)	2, 3
Kissling v. Hearn, 264 App.Div. 900, 35 N.Y.S.2d 821, affd. 290 N.Y. 563, 47 N.E.2d 962	2
Stella Flour & Feed Corp. v. National City Bank, 285 App.Div. 182, 136 N.Y.S.2d 139, appeal denied 285 App.Div. 871, 137 N.Y.S. 2d 826, aff'd. 308 N.Y. 1023, 127 N.E.2d 864	2
Gucker v. Town of Huntington, 254 App.Div. 10, 3 N.Y.S.2d 788	2, 3
Jones v. City of Binghamton, 259 App.Div. 938, 19 N.Y.S.2d 513, appeal denied 259 App.Div. 955, 20 N.Y.S. 2d 844	3
People v. Garzia, 56 A.D.2d 635, 391 N.Y.S.2d 697, affd. 44 N.Y.2d 867, 407 N.Y.S.2d 475, 378 N.E.2d 1045, cert. den. 439 U.S. 930, 99 S.Ct. 318, 58 L Ed. 2d 324 (1978)	3

PAGE

People v. Rivera, 38 Misc.2d 586, 238 N.Y.S.2d 620, affd. 19 A.D.2d 863, 243 N.Y.S.2d 669, revd. 14 N.Y. 2d 441, 252 N.Y.S.2d 458, 201 N.E.2d 32, cert. den. 379 U.S. 978, 85 S.Ct. 679, 13 L Ed 2d 568 (1965) 3

People v. Cassone, 35 Misc.2d 699, 230 N.Y.S.2d 822, revd. 20 A.D.2d 118, 245 N.Y.S.2d 843, affd. 14 N.Y. 2d 942, 252 N.Y.S.2d 335, cert. den. 379 U.S. 892, 85 S.Ct. 167, 13 L Ed 2d 95 (1964) 3

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Statute Cited

28 U.S.C.:

1257(3) 1, 2

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PETITIONER'S REPLY BRIEF

POINT I

The petition is not jurisdictionally defective.

Respondent claims that the petition for a writ of *certiorari* in this case is jurisdictionally defective in that the order sought to be reviewed is not a "final" one as contemplated by 28 U.S.C. 1257(3). Respondent contends that

this Court's decision in *Chapman* v. *California,* 405 U.S. 1020, 31 L Ed 2d 483, 92 S.Ct. 1284 mandates the denial of *certiorari* in the case at bar.

We respectfully submit that there are several reasons why (1) the position taken by respondent is incorrect and (2) the petition should be heard on the merits at this time.

First, by its language, 28 U.S.C. 1257(3) does not preclude review of the petition for *certiorari* in cases involving appeals from pre-trial orders on motions to suppress.

Second, the petition herein meets each of the criteria set forth in this Court's decision in *Cox Broadcasting Corp.* v. *Cohn,* 420 U.S. 469, 95 S.Ct. 1029, 43 L Ed 2d 328 (1975) with regard to accepting jurisdiction in state court matters of this type.

Third, the *Chapman* decision is inapplicable here in that (1) *Chapman* involves the application and consideration of appellate procedures followed in California and not New York, and (2) *Chapman* pre-dates this Court's decision in *Cox Broadcasting Corp.* which is the latest discussion by this Court concerning the standard to be applied to petitions for *certiorari* from interlocutory state court determinations.

Fourth, the established procedural law in New York, which respondent has totally ignored, regarding the "finality" of orders of the New York State Court of Appeals shows that the order sought to be reviewed, which here involves the federal issue in question, is final for all purposes in New York and cannot be the subject of further review (*Kissling* v. *Hearn,* 264 App.Div. 900, 35 N.Y.S.2d 821, *aff'd.* 290 N.Y. 563, 47 N.E.2d 962; *Stella Flour & Feed Corp.* v. *National City Bank,* 285 App.Div. 182, 136 N.Y.S.2d 139, appeal denied 285 App.Div. 871, 137 N.Y.S. 2d 826, *aff'd.* 308 N.Y. 1023, 127 N.E.2d 864; *Gucker* v.

Town of Huntington, 254 App.Div. 10, 3 N.Y.S.2d 788; *Jones* v. *City of Binghamton,* 259 App.Div. 938, 19 N.Y.S.2d 513, appeal denied 259 App.Div. 955, 20 N.Y.S. 2d 844).

Fifth, in cases in precisely the same pre-trial procedural posture as the one at bar, this Court, both before and after its decision in *Chapman,* has considered petitions for *certiorari* from the New York State Court of Appeals on the merits and has not denied them on jurisdictional grounds (*People* v. *Garzia,* 56 A.D.2d 635, 391 N.Y.S.2d 697, *aff'd.* 44 N.Y.2d 867, 407 N.Y.S.2d 475, 378 N.E.2d 1045, *cert. den.* 439 U.S. 930, 99 S.Ct. 318, 58 L Ed. 2d 324 [1978]; *People* v. *Rivera,* 38 Misc.2d 586, 238 N.Y.S.2d 620, *aff'd.* 19 A.D.2d 863, 243 N.Y.S.2d 669, *revd.* 14 N.Y.2d 441, 252 N.Y.S.2d 458, 201 N.E.2d 32, *cert. den.* 379 U.S. 978, 85 S.Ct. 679, 13 L Ed 2d 568 [1965]; *People* v. *Cassone,* 35 Misc.2d 699, 230 N.Y.S.2d 822, *revd.* 20 A.D.2d 118, 245 N.Y.S.2d 843, *aff'd.* 14 N.Y.2d 942, 252 N.Y.S.2d 335, *cert. den.* 379 U.S. 892, 85 S.Ct. 167, 13 L Ed 2d 95 [1964]).

Finally, this petition should be reviewed on the merits at this time since it involves a significant Constitutional issue that has already resulted in differences of opinion regarding the current state of the law. (See the various opinions in the appendix to the petition as well as this Court's decision in *Walter* v. *United States,* —— U.S. ——, 48 U.S.L.W. 4807 [1980]). Such circumstances make this case particularly ripe for review at this time (*Cox Broadcasting Corp.* v. *Cohn,* 420 U.S. 469 at 484-85).

POINT II

The petition presents an ample basis for review by this Court.

It is difficult to imagine how respondent can, on the one hand, adopt petitioner's statement of facts in its entirety and, on the other, maintain, with an almost casual indifference, that such facts present no issue warranting review by this Court.

We submit that, in reality, respondent has only now assumed this unconcerned attitude to belie its extreme anxiety about the matter and to minimize the significance of the issues involved. The zeal with which the *prosecution* has sought to compel appellate review to this point and the obvious difficulty that several respected jurists have had with the type of constitutional issue involved herein amply demonstrates that the prosecution cannot possibly be taking this case as lightly as it now seems to be.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari is not jurisdictionally defective and should be granted.

Dated: New York, New York
October 31, 1980

Respectfully submitted,

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